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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 682

ANGELO PASSINI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 701

CHARLES COLE, JESSE COWAN AND AMERICO DE PIETTO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 975 Misc.

MIKE DE MABO

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 365 F. 2d 57.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1966. Petitions for rehearing on behalf of petitioners Passini and De Maro were denied on September 15, 1966. A petition for rehearing on behalf of petitioners Cole, Cowan and De Pietto was denied on September 19, 1966. Passini's petition for a writ of certiorari (No. 682) was filed on October 14, 1966; and the petition of Cole, Cowan and De Pietto (No. 701) was filed on October 19, 1966. Mr. Justice Clark extended petitioner De Maro's time for filing to November 14, and his petition (No. 975 Misc.) was filed on November 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Passini (No. 682) presents the following questions:

1. Whether the evidence was sufficient to support his conviction.

2. Whether he was denied the effective assistance of counsel.

All petitioners, except Passini, raise the following two questions:

3. Whether the failure of the trial judge to turn over to the defense minutes of the grand jury testimony of one witness required reversal of their convictions.

4. Whether it was error for the trial court to admit evidence of the flight of a co-conspirator.

In addition, the petition in No. 701 raises the following questions:

5. Whether the trial court properly admitted evidence seized incident to an arrest of a co-defendant.

6. Whether count thirty-nine of the indictment (against Cole alone) was insufficient as matter of law.

STATUTES INVOLVED

21 U.S.C. 174 provides in part:

> Whoever fraudulently or knowingly imports or brings into the United States or any territory under its control * * * or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug * * * or conspires to commit any of such acts * * * shall be imprisoned not less than five or more than twenty years * * *.

18 U.S.C. 1403 provides in part:

> Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting an offense or a conspiracy to commit an offense the penalty for which is provided in * * * (21 U.S.C. sec. 174) * * * shall be imprisoned not less than two and not more than five years * * *.

STATEMENT

The five petitioners and eleven other defendants were convicted in the United States District Court for the Northern District of Illinois of importing and sell-

ing narcotics, and conspiring to do so, in violation of 21 U.S.C. 174. In addition, petitioner Cole was convicted of using a telephone in facilitating the sale of narcotics, in violation of 18 U.S.C. 1403. On June 29, 1964, petitioners Cole, De Maro, and De Pietto were sentenced to imprisonment for twenty years, petitioner Cowan for ten years, and petitioner Passini for five years. The court of appeals affirmed the convictions.

The evidence established that the defendants were members of a conspiracy trafficking in narcotics, which operated on three levels—suppliers, distributors and salesmen. Petitioners De Pietto and De Maro were suppliers, and petitioners Cole and Cowan were distributors. None of these petitioners questions the sufficiency of the evidence against him.

Petitioner Passini, who does attack the sufficiency of the evidence to convict him, was shown to have engaged in the following activities: On August 22, 1961, Barbara Mitchell and Opal (Pat) Cole drove to the parking lot of a Chicago motel. Passini, whom Barbara Mitchell did not see approach, entered the rear seat of the automobile (Tr. 2633–2637), received $5,000 from Opal Cole in return for a package, and commented that "the stuff was so strong he had to put on a mask while mixing and had to turn the fan on" (Tr. 2428–2430).[1] After the money was passed, Barbara Mitchell turned around in the front seat and looked at Passini. After some discussion of the narcotics busi-

[1] "Tr." designates the Transcript of Trial Proceedings (which we are lodging with the Clerk of this Court) and "J.A." designates petitioners' Joint Appendix.

ness, Passini left the car. Barbara Mitchell observed Passini taking just a few steps away from and to the rear of the vehicle (Tr. 2640–2642).

On September 16, 1963, Frank Carrioscia told Sparkman (a government informer) that he would have narcotics for him later on in the evening. At about 9:00 that evening Carrioscia, Joe Battiato and petitioner Passini met in Andy's Grill. Shortly afterwards, Battiato and Carrioscia left the grill, and Battiato gave Carrioscia a brown paper bag. Carrioscia then proceeded to meet Sparkman and gave him the brown paper bag, which contained heroin (Tr. 3682–3695). In the meantime, Battiato returned to Passini in Andy's Grill, and the following conversation was overheard by an agent seated at a nearby table (Tr. 4211–4213, 4439):

> BATTIATO. We are in trouble.
>
> PASSINI. What is wrong?
>
> BATTIATO. There is a white Caddy convertible sitting over by the meet spot. That is the second time I saw it. It pulled right out behind Frank.
>
> PASSINI. Maybe we ought to call Frank?
>
> DE MARO. No, Frank hasn't had time to get back to the west side yet. We will go over there.

On September 27, 1963, Passini was observed walking towards defendant Joe Battiato's residence, carrying a brown paper package under his arm (Tr. 3845). Battiato met Passini, and they both entered the apartment building. A few minutes later, Battiato left the building and gave Frank Carrioscia the package (Tr. 3845–3846). Passini went to Andy's Grill at

about 8:45 p.m., where an agent seated in the bar heard the following conversation between Passini, Ted De Rose and Mike De Maro (R. 3950):

> PASSINI. Frank only showed up with a thousand.
>
> DE ROSE. What about the other three hundred?
>
> PASSINI. Frank will be here in a few minutes, Mike. You can talk to him yourself.

At about 9:45 that evening, Frank Carrioscia met Mike De Maro and Joe Battiato, and gave De Maro a stack of bills, saying, "Here's the grand." (Tr. 3706–3708). Later that evening, Carrioscia transferred heroin to the informer, Sparkman (Tr. 3711–3714).

ARGUMENT

1. Petitioner Passini contends that there was insufficient evidence to sustain his conviction on the conspiracy count, alleging that the witness Barbara Mitchell was mistaken in her identification of him as the person who received $5000 from Opal Cole and that agent Aruslan was mistaken in identifying him as the person, carrying a brown paper bag, who met Battiato on September 27 (No. 682, Pet. 18, 34–35, 36).[2]

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[2] Agent Aruslan's testimony is reported as follows (J.A. 267; Tr. 3845): "A few minutes after that Battiato came back out, stood in front, smoked a cigarette and walked up and down. Several minutes later Angelo Passini walked west toward Battiato's residence. *Ted DeRose* was walking with a noticeable limp and he was carrying a brown paper package under his left arm. Angelo Passini met Battiato in the front of the building and they both entered." [Emphasis added.]

It is apparent from the context that the reference to "Ted DeRose", instead of "Angelo Passini" was either a slip of

These issues of credibility, resolved unfavorably to Passini by the jury, present no question warranting review. *Cramer* v. *United States,* 325 U.S. 1. Although there was no direct proof of an "agreement" to distribute narcotics, the agreement can be inferred from circumstantial evidence. *Krulewitch* v. *United States,* 336 U.S. 440. Considering all the activities of petitioner, the jury could properly conclude beyond a reasonable doubt that Passini conspired to traffic in narcotics.

2. Passini was represented at trial by attorney Melvin B. Lewis. Prior to the impanelling of the jury, Passini moved the court that he be allowed to represent himself together with his attorney. The trial court granted the motion, advising that Passini was to act with the same decorum as the attorneys present in the courtroom (J.A. 4). On the seventh day of the trial (which lasted a period of seven weeks) Mr. Lewis felt ill and asked the court if he might be temporarily excused. After the trial court was advised that another attorney, Mr. McDonnell, would continue Passini's defense with Passini's consent, Mr. Lewis was excused (Tr. 490–491). It was

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the tongue or a reporter's error. On cross-examination by Passini's counsel, Aruslan stated that he could distinguish between Passini and De Rose—Passini had a limp, De Rose had a peculiar walk (Tr. 3884). In another answer (which was subsequently stricken as not being responsive to the question put), Aruslan stated, "That was Angelo Passini walking west on south side of Belden, with—I stated with a noticeable limp, carrying a brown paper bag under his left arm, meet Joe Battiato in front of his apartment building, and both entered" (Tr. 3938–3939).

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thereafter determined that Mr. Lewis had suffered a mild heart attack, and that he would be hospitalized for an undetermined time (Tr. 541). With the consent of Passini, Mr. McDonnell continued representation of Passini through the rest of the proceedings of that day (Tr. 545). The following day, the uncertainty of the length of Mr. Lewis' stay in the hospital was again reported to the court (Tr. 691). Passini's motion for a continuance or severance was denied. He refused to accept the services of any of the attorneys present in the courtroom representing other defendants (Tr. 694–697), but again consented to representation by McDonnell for the remainder of that day (Tr. 702–703). The following day, another motion by Passini for continuance was denied, and Passini refused the appointment of any attorneys present in the courtroom (Tr. 921–923). The court then released Mr. McDonnell, of whose services Passini disapproved, from further representation (Tr. 923). The government moved the court for a short continuance in order to obtain the services of an independent attorney for Passini. Passini refused the offer, stating that he would accept only Mr. Lewis as his attorney (Tr. 945–948). Several other motions for a continuance were denied, and the court directed another attorney, Mr. Devine, to protect Passini's interest, whether or not Passini agreed (Tr. 976–977). Mr. Lewis returned six trial days after he was taken ill (Tr. 1829–1830).

During Mr. Lewis' absence, no evidence was introduced that implicated petitioner Passini, who was charged only in the conspiracy count. The testimony

relating to Passini was given by Barbara Mitchell, and agents Valentine, Aruslan, Jackson and Patch. Mr. Lewis either cross-examined, or had the opportunity to cross-examine, each of these witnesses.

Petitioner does not, and cannot, show that he was prejudiced by Mr. Lewis' absence. Rather he contends that absence of counsel *ipso facto* requires reversal. It is evident, however, that petitioner was not really deprived of counsel but sought to use the temporary illness of his attorney as a means of escaping trial. The trial court properly protected Passini's interests in this situation and did not abuse its discretion in refusing to grant a continuance. *United States* v. *Bentvena,* 319 F. 2d 916 (C.A. 2); *United States* v. *Dardi,* 330 F. 2d 316 (C.A. 2); *Danziger* v. *United States,* 161 F. 2d 299 (C.A. 9), certiorari denied, 332 U.S. 769.

3. Petitioners, other than Passini, contend that it was reversible error to refuse to turn over to the defense certain grand jury testimony of the witness Beulah Greenlaw. On direct examination, the testimony of Mrs. Greenlaw implicated several of the original co-defendants as dealers in narcotics. Of the parties before this Court, however, only petitioners Cole and De Maro were mentioned. The witness testified that in July or August, 1960, at the direction of Opal Cole, she carried money in a brown paper bag to petitioner Cole, "because he was the big man" (Tr. 203). About three days later, she was sent on a similar mission, again giving money to petitioner Cole in a brown paper bag (Tr. 204–205). She further testified that on three occasions during the month of Au-

gust 1963, she received heroin from petitioner De Maro (Tr. 206–218).

Upon completion of the witness' testimony on direct examination, the following colloquy occurred between counsel and the court (Tr. 227–232):

> Mr. McDONNELL. * * *
>
> If this witness has testified before a grand jury, I believe the defense is entitled to any minutes or notes taken during the course of her testimony before said grand jury.
>
> The COURT. On what basis?
>
> Mr. McDONNELL. Judge, I think there will be conflicting statements between anything which she stated before the grand jury and she has presently told this court and jury.
>
> Mr. BAILEY. On what basis?
>
> Mr. McDONNELL. On the basis of my investigation of this entire matter, Judge.
>
> Mr. BAILEY. There is no basis in the record for that.
>
> Mr. McDONNELL. Well, I am advising the court. I am certainly entitled to the minutes of the grand jury. If I am representing to the court that my investigation reveals something diametrically opposed to what this witness has testified to, am I not entitled to inquire to see if she gave the same story previously to this under oath? After all, Judge, she is testifying to something which occurred four years previous to this date.
>
> * * * * *
>
> Mr. BAILEY. I will represent to the court at this time that the witness has testified before a federal grand jury. * * *

> Mr. McDONNELL. There is no way I can tell if there is any inconsistency between the grand jury testimony of the witness and that which she might have testified to here.
>
> The COURT. Mr. Bailey has announced the correct procedure under the cases. First, it would have to be examined by me to determine.
>
> Mr. McDONNELL. Well, then, I request the court to examine them.

After an *in camera* inspection of the grand jury minutes, the trial court denied the motion for production, noting in passing that there was no material discrepancy between the witness' testimony at trial and that before the grand jury (Tr. 913–914).

Contrary to petitioners' contention, *Dennis* v. *United States,* 384 U.S. 855, does not require automatic production of grand jury minutes without a showing of "particularized need" as required by *Pittsburgh Plate Glass Co.* v. *United States,* 360 U.S. 395. This Court carefully pointed out in *Dennis* that the trial judge retains the function of "* * * deciding whether a case has been made for production * * *" (384 U.S. at 875). In this case, as clearly reflected in the above colloquy, defense counsel merely hoped that there would be useful information in the grand jury minutes, and did not show any "particularized need" which outweighed the policy of secrecy of the grand jury minutes.

Witness Greenlaw's testimony in no way related to the conduct of petitioners Cowan and De Pietto, and her testimony concerned only two transactions with petitioner Cole and three transactions with petitioner De Maro. One of the transactions with Cole was

corroborated by her husband, Robert Greenlaw (Tr. 1006–1009), as was one of the transactions with De Maro (Tr. 1010–1011). The slight discrepancy of dates between the testimony of Beulah Greenlaw and the corroborating testimony of her husband does not of itself entitle petitioners to discovery of the grand jury minutes, especially where there was no material discrepancy between the substance of the described transactions.[3] Moreover, the testimony of Beulah Greenlaw was by no means critical to the government's case. The record is replete with similar testimony showing petitioners Cole and De Maro to be involved in a conspiracy to traffic in narcotics (*e.g.*, Tr. 479–480, 934–943, 1124–1126, 1152–1153, 2395–2398, 2403–2404, 2415–2419, 2435–2437; 3706–3708, 3993–4000, 4073–4074). Under these circumstances, the failure of the trial judge to turn over the grand jury minutes did not constitute reversible error. Compare *Dennis* v. *United States, supra,* at 872–873.

4. On October 25, 1963, at about 9 p.m., a federal agent saw Joe Battiato drive up to his residence with one Nolan Mack, go to his apartment and return and give a brown paper bag to Mack, who then drove off (Tr. 3855–3856.)

At approximately 9:20 p.m., agent Ruhl, who had sttationed himself near Mack's residence, observed Mack

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[3] Beulah Greenlaw testified that she dealt with Charles Cole in the middle of July, 1960, and with Mike De Maro in the early part of August, 1963. Her husband testified that she met Cole in August, 1960, and that she met De Maro in the late part of August, 1963.

drive by. When Mack spotted agent Ruhl, he accelerated his vehicle, and Ruhl gave chase. Midway through a high-speed chase, Ruhl observed Mack shake a white powder out the car window and throw an unidentified object from the car. Eventually, Mack halted his vehicle. After Ruhl identified himself and advised Mack that he was under arrest, a gun battle ensued, in which Mack was fatally wounded (J.A. 324–327). Approximately five minutes later, agent Halpen arrived and, after attending to agent Ruhl, who also had been seriously wounded, examined Mack's vehicle. A white powder found on the arm of the door and on the floor was later identified as heroin (J.A. 280).

The only question concerning the admissibility of this testimony is one of relevancy. Whether the conspiracy had terminated, as suggested by petitioners, need not be determined, since *acts* of a co-conspirator, which are relevant to the proof of the conspiracy, are admissible against all conspirators, even though the conspiracy has ended. *Lutwak* v. *United States*, 344 U.S. 604, 617–618. In the present case, testimony relating to the chase and capture of Nolan Mack was clearly relevant to proof of the conspiracy. Evidence showed that Battiato, a co-conspirator, had given Mack a paper bag, the contents of which were unknown. When Mack was finally apprehended, heroin was found in his car, but there was no evidence of a paper bag. In order to account for the absence of the paper bag, and the possible chain of possession of the heroin from Battiato to Mack, testimony that an object was thrown from the vehicle by Mack was

clearly relevant. It was within the discretion of the trial court to conclude that the relevancy of such evidence outweighed any possible prejudice that might result from its admission. *Hardy* v. *United States*, 335 F. 2d 288 (C.A.D.C.).

5. During the latter months of 1961, federal narcotics agent Dayle coordinated his investigative activities through two government informers, Aubrey Gibson and Houston Garner. Through them, Dayle learned that Opal Cole and her brother LaFauncie Johnson, who both used an apartment at 8213 South Cottage Grove, were distributors of heroin (*e.g.*, Tr. 514–517, 526–527, 549–551, 555–563, 566–570).

On December 12, 1961, after Dayle had gathered this information, an indictment was filed against Opal Cole and LaFauncie Johnson, *inter alia*, charging several narcotics violations (Tr. 688, 706). On that same day, Dayle was informed that bench warrants had issued for the arrest of Cole and Johnson (Tr. 706), and he directed agent Hughes to proceed to 8213 South Cottage Grove to effect their arrests (Tr. 717). Hughes arrested Opal Cole at her dress shop, which is located approximately four lots away from her residence (Tr. 719). After conducting a search of the dress shop, Hughes, some local officers, and Opal Cole continued to 8213 South Cottage Grove to effect the arrest of LaFauncie Johnson (Tr. 719). Using Opal Cole's key to gain entrance to her apartment, Hughes arrested LaFauncie Johnson, who was found in the living room (Tr. 720–721). The apartment was then searched, and an address book, which contained the

name of petitioner De Maro, was found in the top drawer of a bureau in a bedroom (Tr. 723).

The trial court denied a motion to suppress the address book, filed by Opal Cole and joined in by the others, on the ground that the search was proper as incident to the arrest of LaFauncie Johnson (Tr. 762). The court of appeals affirmed that ruling.

Although neither Opal Cole nor Johnson is before this Court,[4] petitioners in No. 701 contend that the address book was improperly admitted in evidence. As the courts below held, however, the seizure was proper under well established principles. When agent Hughes arrived at the apartment and arrested LaFauncie Johnson pursuant to the warrant, he was well informed that both Cole and Johnson were in the business of distributing narcotics. It was therefore reasonable for him to search the apartment, occupied by Opal Cole and Johnson, incident to the arrest of Johnson. *United States* v. *Rabinowitz,* 339 U.S. 56; *Harris* v. *United States,* 331 U.S. 145. The address book found in the search identified another member of the conspiracy, Mike De Maro, who was Opal Cole's supplier. Since Opal Cole was in the business of distributing narcotics, this address book indicating the address of other business connections was properly seized as part of the equipment used to commit the offense of distributing narcotics. *Marron* v. *United States,* 275 U.S. 192, 199; *Abel* v. *United States,* 362 U.S. 217, 237.

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[4] At the time of the search of the apartment, petitioner Charles Cole was divorced from Opal Cole, and he had no interest in the searched apartment (Tr. 2693–2695, 4979–4980).

In any event, the address book only served to establish that there was some relationship between De Maro and Opal Cole, and was cumulative to other testimony that Opal Cole kept De Maro's name in an address book (Tr. 2407).

6. Petitioner Cole's attack on the sufficiency of count 39 of the indictment, in which he alone was named, need not be considered, since his conviction on the conspiracy count alone will support the general sentence imposed. *Claasen* v. *United States*, 142 U.S. 140; *Barenblatt* v. *United States*, 360 U.S. 109, 115.

In any event, the count sufficiently alleged an offense under 18 U.S.C. 1403. It charged as follows (J.A. 31):

> During or about the month of August, 1960, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, and within the jurisdiction of this Court, the defendant, CHARLES COLE, used a communication facility, to wit, a telephone in committing and in causing and facilitating the commission of, and in attempting to commit, an offense, the penalty for which is provided in Title 21, Section 174, United States Code, in violation of Title 18, Section 1403, United States Code.

The indictment thus informed petitioner that he was charged with using the telephone to facilitate narcotics transactions in Chicago in August, 1960. The fact that it did not specify the particular aspect of 21 U.S.C. 174 which was violated is unimportant, since the use of the telephone to assist any violation of 21 U.S.C. 174 falls within the interdiction of 18 U.S.C. 1403. There is no showing that petitioner was

prejudiced in his defense by the failure of the indictment to specify more exactly the date of the call or to whom the telephone call was made. To the extent that the indictment was broader than it had to be,[5] petitioner was benefitted, from the standpoint of protection against double jeopardy, for he could not again be prosecuted for any telephone calls in aid of narcotics transactions to anyone during the whole period covered by the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1966.

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[5] One Mildred McLean testified that, in August 1960, petitioner Cole telephoned her, in connection with a narcotics transaction, and told her "to tell Virge to hurry up with the money, because people was (sic) breathing down his neck" (Tr. 1160).

U.S. GOVERNMENT PRINTING OFFICE: 1966